

## **FINAL STATEMENT OF REASONS:**

This action amends provisions governing body inspections of clothed female inmates and clothed male inmates within the California Department of Corrections and Rehabilitation (Department). California Code of Regulations, Section 3287, is being amended to afford a gender-appropriate process to accomplish body inspections of clothed inmates.

Research conducted by the U.S. Department of Justice, Bureau of Justice Statistics, found that 57 percent of female offenders were physically or sexually abused prior to prison admission, compared with 16 percent of male offenders<sup>1</sup>. Additional research conducted by the U.S. Department of Justice, National Institution of Corrections suggests that cross-gender search practices within the Department's prisons often re-traumatize women with histories of sexual and physical abuse<sup>2</sup>. This research, along with recent legislation, SB 737, which was signed into law, established a renewed focus and important governmental objective regarding rehabilitation of inmates within the Department. This research, along with recent legislation, SB 737, which was signed into law, established a renewed focus and important governmental objective regarding rehabilitation of inmates within the Department. It is necessary that this regulation be filed as an emergency due to the operational necessity of maintaining the safety and security of the prisons by continuing to perform efficient body searches of clothed female inmates while lessening the negative impact on female inmates inherent in cross-gender searches.

This regulation requires that non-emergency body inspections of clothed female inmates be performed by female correctional employees. The Department asserts that minimizing cross-gender contact during routine searches of female inmates serves the legitimate penological interests of maintaining prison security, rehabilitating inmates, and reducing the potential of sexual misconduct and harassment litigation. Additionally, this regulation will continue to allow routine inspections of clothed male inmates to be performed by custody employees of either sex.

This regulation considers privacy concerns unique to female inmates while maintaining the safety and security of the staff at the institution, and eliminates the requirement that male correctional officers perform body searches of female inmates on a routine basis. A 9<sup>th</sup> Circuit Court decision, *Jordan v. Gardner*, 986 F.2d 1521, (9<sup>th</sup> Cir. 1992), found that searches of female inmates by male officers violate a women's Eighth Amendment rights to be free from cruel and unusual punishment when the cross-gender searches of females by male officers were random, non-emergency, without suspicion and conducted on women inmates who had prior histories of abuse and would likely feel re-victimized by the intimate contact.

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<sup>1</sup> U.S. Department of Justice, Bureau of Justice Statistics. April 1999. "Prior Abuse Reported by Inmates and Probationers." Washington D.C.

<sup>2</sup> U.S. Department of Justice, National Institute of Corrections, 2003.  
"Gender-Responsive Strategies: Research, Practice and Guiding Principles for Women Offenders."

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected private persons than the action proposed.

**Subsection 3287 (a) is unchanged.**

**Subsection 3287(b) is unchanged.**

**Subsection 3287(b)(1) initial sentence is unchanged and the existing secondary sentence of subsection 3287(b)(1) is relocated to new subsection (b)(2).**

**Existing subsection 3287(b)(2) is renumbered and relocated to new subsection 3287(b)(5).**

**New subsection 3287(b)(2) is relocated from existing secondary sentence of subsection 3287(b)(1) and is amended** to change language regarding routine inspections of clothed inmates from “either sex” to “male” inmates. These inspections of clothed male inmates will continue to be performed by custody employees of “either sex.” This is necessary to minimize the effect of cross-gender contact while continuing to allow routine clothed inspections to maintain the level of safety and security in an institutional setting. This is also necessary to make language gender specific to address female and male inmates separately with regard to written policies and procedures. This language addresses inspections of clothed male inmates.

**New subsection 3287(b)(3) is adopted** to specify that body inspections of clothed female inmates shall be conducted by female employees only, except in the case of an emergency situation that requires the immediate search of inmates to avoid the threat of death, escape, or great bodily injury, and only until sufficient numbers of female correctional employees are available to assume critical body search duties. This is necessary to minimize the effect of cross-gender contact while continuing to allow routine clothed inspections to maintain the level of safety and security in an institutional setting. This is also necessary to make language gender specific to address female and male inmates, separately, with regards to written policies and procedures. This language addresses inspections of clothed female inmates.

**New subsection 3287(b)(4) is adopted** to state that non-emergency body searches of female inmate shall not, under any circumstances, be performed by male correctional employees. The Department asserts that differences exist between men’s and women’s rights to privacy. This regulation is necessary to lessen the chances of sexual misconduct litigation. It also reduces further trauma and victimization of female inmates who may have a history of abuse.

**New subsection 3287(b)(5) is relocated from subsection 3287(b)(2) is renumbered and the text is unchanged.**

**Subsections 3287(c) through (d) are unchanged.**

**PUBLIC HEARING COMMENTS:**

**Public Hearing was held on August 1, 2005 at 9:00 am.**

No one commented at the Public Hearing.

**SUMMARIES AND RESPONSES TO THE WRITTEN PUBLIC COMMENTS:**

**COMMENTS #1:**

**Comment A:** Commenter contends that the Department is misinformed along with the 9<sup>th</sup> Circuit Court and wants to place correctional employees at risk by not allowing officers to do their jobs.

**Accommodation:** None

**Response A:** Department contends that that minimizing cross-gender contact during routine searches of female inmates serves the legitimate penological interests of maintaining prison security, rehabilitating inmates, and reducing the potential of sexual misconduct and harassment litigation. Furthermore, the Department contends that extensive research has been conducted to support this regulation.

**Comment B:** Commenter contends that there are not sufficient female officers available to conduct the searches that we need to do their daily duties.

**Accommodation:** None.

**Response B:** Department contends that this regulation can be implemented with no increased risk to correctional employees by allowing male correctional staff to perform emergency searches within established parameters that define an emergency.